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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EUGENE GARCIA,

Defendant and Appellant.

B166323

(Los Angeles County  
Super. Ct. No. VA070488)

Appeal from a judgment of the Superior Court of Los Angeles County.

John A. Torribio, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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In a jury trial, appellant James Eugene Garcia was convicted of second degree robbery. (Pen. Code, § 211.)<sup>1</sup> The trial court made findings that appellant had two prior convictions of a serious felony qualifying him for two 5-year enhancements (§ 667, subd. (a)(1)) and requiring that he be sentenced pursuant to the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court denied his motion to strike a prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and sentenced him to an aggregate term of 35 years to life in state prison.

He appeals from the judgment and raises two contentions: (1) the trial court committed reversible error by failing to conduct the inquiry required by *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and (2) he is entitled to resentencing as the trial court abused its discretion when it failed to grant his *Romero* motion.

We reject his convictions and affirm the judgment.

## FACTS

### 1. The Trial Evidence

On April 5, 2002, Jesus Islas was paying for groceries in a liquor store on Central Avenue in Los Angeles County. Appellant approached him and made inquiries about Islas’s gang membership. Islas replied that he was “from nowhere.” Appellant claimed that he had a gun, and demanded Islas’s gold neck chains, which were worth about \$300 or \$400. Islas complied, and appellant’s companion removed the chains from Islas’s neck and handed the chains to appellant. During the confrontation, Islas could smell an odor of an alcoholic beverage about appellant’s person.

After the robbery, the clerk told Islas that appellant did not have a gun, and the clerk and Islas confronted appellant outside the liquor store. Islas pushed appellant, causing him to fall, and Islas recovered his chains from appellant’s pocket. Appellant was arrested. After a *Miranda* waiver (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant admitted to a deputy sheriff that he had committed the robbery and that he

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<sup>1</sup> All further references are to the Penal Code unless otherwise specified.

knew what he had done was wrong. Appellant also said that before the robbery, he had been drinking and taking medication, and he had a history of mixing alcohol with his medication and getting into trouble.

In defense, appellant testified that his companion, Hector, owed appellant money. He claimed that Hector told him that Islas owed Hector money. Appellant and Hector entered the liquor store. Appellant described how Hector had intimidated Islas by asking appellant, ““Do you still have your gun?”” Appellant replied to Hector, ““Yeah, I still got it.”” Appellant then asked Hector, ““Are you just going to take his sh--?”” and in response, Hector removed Islas’s neck chain and handed it to appellant, telling appellant, ““You’re paid.”” Hector quickly left the store.

Afterwards, Islas protested to appellant that he did not know Hector and that Islas did not owe Hector money. Appellant told Islas, ““Well, he says you owed him money,”” and he refused to return Islas’s chain.

Soon thereafter, in the parking lot, Islas and the grocery clerk confronted, hit, and kicked appellant, Islas recovered his chains, and the grocery clerk took appellant’s money. Los Angeles County deputy sheriffs arrived and arrested appellant. Appellant claimed that at the time of the robbery, he had had eight or nine drinks of an alcoholic beverage, and he had taken the prescription medications Klonopin, Vicodin, and Prexal. Appellant claimed that he was intoxicated.

The jury returned a verdict of guilty for the robbery.

## **2. The Sentencing Proceedings**

At sentencing, the trial court read and considered a probation report indicating that appellant was 39 years old. In the probation report, the probation officer said that the victim claimed that appellant seemed drunk during the robbery and that appellant could hardly stand up straight.

The probation report summarized appellant’s criminal history. As a juvenile, appellant had a California Youth Authority commitment; he was discharged after parole in 1987. As an adult, in 1987, he was convicted of breach of the peace. In 1988, he was

convicted of grand theft and committed to prison for a 16-month term. (Appellant said that this offense arose from his breaking into his brother's residence to steal a firearm.) Later, he was paroled, he violated parole, and he was reinstated on parole, at which time he was also surrendered to the United States Marshall as he was wanted for a federal bank robbery. (Appellant claimed that he had walked into a bank and asked for money; appellant also said that someone had accused him of having a gun during the robbery, but that was not true.) In 1991, he was convicted of the federal bank robbery and committed to federal prison for a term of 42 months. Later, he was granted federal supervised release, which he violated twice. He served an additional year in federal prison, and on January 14, 1997, his supervised release was terminated. In 1998, he was convicted of making a terrorist threat and of possessing marijuana for sale. (These convictions arose out of an incident involving appellant's girlfriend.) He was imprisoned for two years and paroled and returned four times to state prison for probation violations. (He explained to the probation officer that his parole violations arose from misconduct while he was under the influence of medications and alcohol.) In 1999, he suffered a conviction for driving under the influence of alcohol and/or drugs.<sup>2</sup>

The report indicated that appellant claimed a history of drug abuse. Previously, his drug of choice was heroin, and he used that substance from the year 1987 to the year 2000. He admitted “speed balling,” the use of a combination of cocaine and heroin, and “free basing” cocaine in the year 2000. He said he currently is an alcoholic, and he drinks to loss of consciousness. He denied that he previously had attended a drug or an alcohol rehabilitation program. He claimed that he has been diagnosed as “Bipolar” or schizophrenic and that he takes medication for his mental condition. Six years ago, while

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<sup>2</sup> During the trial, when the parties discussed appellant's impeachment with his prior convictions, the prosecutor asserted that appellant's “rap sheet” additionally disclosed that appellant had a 1998 misdemeanor conviction for the willful infliction of corporal injury on a spouse.

working, he fell off a truck and broke his knees and back. He takes Vicodin for the pain from the resulting injuries.

Appellant has an estranged wife and two teenage daughters. His \$800-a-month workers' compensation benefits from his accident is used to support his family. He obtained his high school diploma while confined in the California Youth Authority, and he has a tattoo that says, "'Compton,'" but he denies gang affiliation. The probation officer reported that appellant wanted to attend drug rehabilitation. Appellant complained to the probation officer that he has been in prison for 22 years, and he needs drug and alcohol rehabilitation, not further imprisonment.

The probation officer recommended a commitment to state prison.

During the oral proceedings of sentencing, trial counsel asked the trial court to grant appellant leniency by punishing him as a second-strike offender. She argued that leniency was warranted because appellant committed one of the triggering offenses, making a terrorist threat, before that offense was included in the list of serious felonies triggering the Three Strikes law. She also urged that appellant had suffered a beating in this case after the robbery, and although his defense did not amount to a claim of right, appellant committed the offense believing that Islas owed Hector money.

The trial court had an exchange with trial counsel in which it acknowledged that it recalled the facts of the current case from the trial. However, the trial court declined to grant appellant leniency pursuant to the decision in *Romero, supra*, 13 Cal.4th 497. The trial court recited appellant's criminal history into the record and said that appellant's record was so serious that it would be an abuse of its discretion to reduce appellant's term of imprisonment.

The trial court imposed a term of 25 years to life in state prison, enhanced by two 5-year terms for the prior serious felony convictions, a total term of 35 years to life.

## DISCUSSION

### 1. The Claimed Failure to Make an Adequate *Marsden* Inquiry

Appellant contends that he is entitled to a reversal of the judgment because the trial court failed to make a proper *Marsden* inquiry after appellant made several written complaints about his representation by appointed trial counsel. We disagree.

#### *A. The Facts*

Following the submission of the case to the jury but prior to jury's return of its guilty verdict, trial counsel presented a three-page handwritten document to the trial court that appellant had personally prepared. There was no caption on the document designating its nature. The first paragraph said, "Declaration of James Garcia in Regards to an impartial Trial." Appellant then set forth a series of complaints that he had about trial counsel's effectiveness: (1) he claimed that he had been "forced into a trial with no communication with counsel"; (2) before trial, he had asked his trial counsel to enter an "NGI plea" due "to his extensive mental health background," and his trial counsel had ignored his request to enter that plea and told him that she proposed to enter the plea only after conviction -- appellant later discovered that such a plea cannot be raised at such a late stage in the proceedings; (3) trial counsel failed to call the arresting and investigating officers as witnesses to impeach the victim's trial testimony, which would have lent support to his defense; (4) trial counsel failed to obtain an eyewitness identification expert to testify at trial to assist in challenging the highly suggestive one-man show-up that preceded his arrest; (5) trial counsel failed to find a competent investigator to go to the crime scene and question potential defense witnesses; (6) trial counsel failed to secure the liquor store's surveillance tapes, which would be a valuable tool in proving appellant's innocence; and (7) trial counsel's "total lack of communication" and "failure to look into the many ways in effectively defending and presenting a defense" violated appellant's right to have a fair and impartial trial. Appellant cited one federal case in support of his motion, which appellant summarized as standing for the proposition that he had a right to a competent attorney as a diligent, conscientious advocate.

Trial counsel handed the document to the trial court. After the trial court read the document out loud, the trial court concluded that it possibly was a *Marsden* motion. The trial court asked the prosecutor to step out of the courtroom, which she did.

In the prosecutor's absence, the trial court said to appellant, "[Y]ou kind of had a shotgun approach. Is that what you wanted to bring to the [trial] court's attention?" Appellant replied, "That, and three police officers arresting officers, their story is completely different from the story they say he gave them."

The trial court told appellant that it could not make a finding of ineffective trial counsel when at the trial, appellant took the witness stand and admitted that he had participated in the robbery and that he had taken the victim's personal property. Appellant protested, "I didn't take the chains, they were given to me." The trial court replied that appellant had "walked out of the store with the chains in [his] pocket." Appellant again protested, "That's with the intent to get, to keep and never give back, but I gave them back to him."

The trial court brought the hearing to a close by stating, "Well, I would just indicate for the record that your sworn testimony contradicts the statement you just filed with the court, so I find it to be without merit."

### ***B. The Relevant Legal Principles***

*People v. Sharp* (1994) 29 Cal.App.4th 1772, 1786-1787,<sup>3</sup> summarized the legal principles that apply when a defendant raises what amounts to a post-conviction claim of ineffective trial counsel: "The decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney is a matter entrusted to the sound discretion of the trial court. (*People v. Marsden, supra*, 2 Cal.3d at p. 123.) 'When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to

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<sup>3</sup> *People v. Sharp* was overruled on another point in *People v. Martinez* (1995) 11 Cal.4th 434, 452.

enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel.’ (*People v. Webster* (1991) 54 Cal.3d 411, 435; *People v. Marsden, supra*, 2 Cal.3d at pp. 123-125 [trial court must give defendant an opportunity to explain the reasons for desiring new counsel].) ‘[T]he inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the future. But the decision must always be based on what has happened in the past.’ (*People v. Smith* (1993) 6 Cal.4th 684, 695, italics in original.) ‘If the claim is based upon acts or omissions that occurred at trial or the effect of which may be evaluated by what occurred at trial the court may rule on the motion for new trial without substituting new counsel.’ (*People v. Stewart* [(1985)] 171 Cal.App.3d [388,] 396-397.) The same standard of proof applies to a motion for substitute counsel made in the trial court whether it is made before or after conviction. (*People v. Smith, supra*, 6 Cal.4th at p. 696.)” (*Id.* at pp. 1786-1787.)

Other decisions have elucidated the standard for demonstrating ineffective trial counsel. “The burden of proving ineffective assistance of counsel is on the defendant.” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) “To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant in the sense that it ‘so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ [Citations.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 366.)

A court need not address both prongs of the test for ineffective counsel before rejecting a claim of ineffective trial counsel. If a defendant fails to establish either prong, the existence of the other prong is moot, and the claim may be disposed of based upon the one prong. (*Strickland v. Washington* (1984) 466 U.S. 688, 697.)



Also, a trial court abuses its discretion if it bases the disposition of *Marsden* complaints on its confidence in the current attorney or on the basis of the trial court's courtroom observations without inviting the defendant to relate specific instances of misconduct. (*People v. Jones* (2003) 29 Cal.4th 1229, 1244.) “A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention “is lacking in all the attributes of a judicial determination.” [Citations.]” [Citation.]” (*People v. Jones, supra*, 29 Cal.4th at pp. 1244-1245; accord, *People v. Nakahara* (2003) 30 Cal.4th 705, 718.)

### ***C. The Analysis***

On appeal, appellant argues that after trial counsel handed the trial court his declaration, the trial court failed to afford him the full-blown evidentiary hearing contemplated by the decision in *Marsden, supra*, 2 Cal.3d 118. Appellant complains that his “declaration” triggered a *Marsden* hearing and that during the hearing, the trial court committed reversible error because it did not allow him “to express himself fully and its inquiry should have been ‘as comprehensive as the circumstances reasonably would permit.’” These arguments are not supported by the record.

In the instant case, the trial court concluded by implication that appellant's handwritten document amounted to a *Marsden* request. The trial court conducted a *Marsden* hearing at that point. It had the prosecutor step out of the courtroom. It considered the vague complaints in appellant's written “declaration,” and solicited from appellant any further remarks that he wanted to make with regard to his “declaration.” There is no indication here that the trial court denied appellant's request for new counsel based only on the trial court's observations of trial counsel's courtroom performance. (See *People v. Hill* (1983) 148 Cal.App.3d 755, 753.) It denied the motion as it lacked merit as appellant could not show prejudice. This record shows that the trial court did everything that is required by *Marsden*. (*People v. Nakahara, supra*, 30 Cal.4th at p. 719 [a defendant is entitled to present evidence or argument on the matter of substitute

counsel]; *People v. Smith* (2003) 30 Cal.4th 581, 604-608 [the court gave the defendant a full opportunity to air all of his complaints].)

Moreover, the trial court properly concluded that appellant had not shown a breakdown in the attorney-client relationship or ineffective trial counsel. In particular, by making a judicial confession, appellant could not show prejudice, a necessary prerequisite to obtaining relief on *Marsden* grounds. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

## **2. The Romero Motion**

Appellant contends that the court abused its discretion by refusing to strike a prior conviction pursuant to section 1385 and *Romero, supra*, 13 Cal.4th 497. The contention lacks merit.

The standards for evaluating a trial court's determination of a motion to strike a prior conviction in furtherance of justice under section 1385 and *Romero* are well known. In considering a motion to strike a prior conviction, the trial court must take into consideration the defendant's background, the nature of his current offense, and other "individualized considerations." (*Romero, supra*, 13 Cal.4th at p. 531.)

"[P]reponderant weight must be accorded to factors intrinsic to the [three strikes] scheme, such as the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) In deciding whether to strike a prior conviction, and in reviewing a trial court's ruling, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*) The defendant's criminal history is among the relevant factors to be considered. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 979 (*Alvarez*).)

“‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.] [A trial court’s] ‘ . . . decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’” *Alvarez, supra*, 14 Cal.4th at pp. 977-978.)

On appeal, appellant makes two claims of an abuse of discretion: (1) the trial court improperly “focused its denial on appellant’s past criminal record rather than upon individualized consideration of the relevant factors presented” in the case; and (2) the trial court failed to afford sufficient weight to appellant’s claim in mitigation that he is Bipolar and an addict and that he has a serious combined substance-abuse problem that is triggering his recidivism. He argues that he should have been sentenced as a second-strike offender. As a second-strike offender, he would have obtained a 20-year term in state prison. Such a term was ample to punish him for the current robbery and more appropriately reflects his personal circumstances.

There is no evidence in the record that the trial court failed to consider individualized factors in mitigation or to afford proper weight to appellant’s personal circumstances, to his background, and to the seriousness of his prior and current offenses. The court listened to all of trial counsel’s comments in mitigation, but it found unconvincing the claims that his prior criminal history was not serious, that his mental illness, addiction, and substance abuse were mitigating, that with substance abuse treatment he would be rehabilitated, and that the current offense did not constitute a serious offense. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 435.)

Appellant was in prison almost continuously after his California Youth Authority commitment. The current robbery is almost identical to the federal bank robbery that he committed. For years, he had engaged in serious drug abuse. His claim that he had no

previous opportunity for drug and/or alcohol treatment is disingenuous. We have no doubt that previously, on probation and on parole, he would have been required to enroll in a substance abuse treatment program. Also, attending Alcoholics Anonymous or Narcotics Anonymous or an alcohol abuse school is required as a condition of probation following a conviction for driving under the influence. Hence, the trial court was warranted in deeming insignificant his claims that his mental illness, addiction, and substance abuse were mitigating. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 [drug addiction amounts to a factor in aggravation, not mitigation, when a defendant has a long-term drug problem and apparently in the past was unwilling to pursue treatment].)

Substantial evidence supports the trial court's exercise of discretion (see *People v. Hubbell* (1980) 108 Cal.App.3d 253, 259), and accordingly, the trial court properly exercised its discretion by refusing to strike a prior conviction (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320-321; *People v. Myers* (1999) 69 Cal.App.4th 305, 310; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337).

#### **DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.  
DOI TODD

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
NOTT